Docket #0075 Date Filed: 04/19/2019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re Achaogen, Inc., Debtor.	Chapter 11 Case No. 19-10844 (BLS) **Hearing Date: May 8, 2019 at 11:00am** **Objections Due: April 22, 2019 at 4:00pm** Dkt. Ref. No. 26

UNITED STATES TRUSTEE'S OBJECTION TO THE DEBTOR'S MOTION TO FILE UNDER SEAL PORTIONS OF ITS CREDITOR MATRIX CONTAINING CERTAIN INDIVIDUAL CREDITOR INFORMATION

Andrew R. Vara, the Acting United States Trustee for Region 3 (the "U.S. Trustee"), through his undersigned counsel, files this objection (the "Objection") to the Debtor's Motion to File Under Seal Portions of its Creditor Matrix Containing Certain Individual Creditor Information (the "Motion," D.I. 26), and in support of his Objection, respectfully states as follows:

PRELIMINARY STATEMENT

The bankruptcy process operates, like the rest of the court system, on the bedrock principles of transparency and disclosure, subject to very limited exceptions. The Motion seeks authority to redact from the Creditor Matrix filed in these bankruptcy cases the home address information of *all* employees—including the Debtor's current and former employees—based on generalized assertions that the information could be used to perpetrate identity theft. The Debtor has not presented any evidence demonstrating that the limited exception under section 107(c) should be so broadly applied and the relief requested should be denied.

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JURISDICTION

1. Pursuant to (i) 28 U.S.C. § 1334; (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a); and (iii) 28 U.S.C. § 157(b)(2)(A), this Court has jurisdiction to hear and determine this Objection.

2. Under 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of Chapter 11 cases filed in this judicial district. This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.),* 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on this Objection. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest).

BACKGROUND

4. On April 15, 2019, the Debtor filed its voluntary chapter 11 petition in this Court.

5. On the same date, the Debtor filed the Motion, seeking authority to, *inter alia,* file the Matrix containing the Debtor's employees' home addresses under seal and file a redacted version of the Matrix. (D.I. 26, ¶ 6).

6. The Motion further states that "the Debtor will provide the proposed claims and noticing agent, Kurtzman Carson Consultants LLC ("KCC"), with the employees' home addresses and instruct KCC to serve the employees at their home addresses."[1] (*Id.*)

[1] According to the Declaration of Blake Wise in Support of First Day Relief (the "Wise Declaration"), "Achaogen has only 36 full-time employees as of the Petition Date, down from 298 in June 2018." (D.I. 3 at ¶ 42).

7. The Debtor concurrently filed a redacted Creditor Matrix. (D.I. 25.)

8. To date, the Debtor has not presented any evidence demonstrating that the limited exception under section 107(c) should be so broadly applied and the relief requested should be denied. Neither the Motion, nor the Wise Declaration identify a specific risk of harm to the employees.

ARGUMENT

9. Rule 1007(a)(1) of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules") requires that a debtor in a voluntary case "file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G and H as prescribed by the Official Forms." Rule 1007-2(a) of the Local Rules of Bankruptcy Procedure (the "Local Rules") provides that "[i]n all voluntary cases, the debtor shall file with the petition a list containing the name and *complete address of each creditor* in such format as directed by the Clerk's Office Procedures." Local Rule 1007-2(a) (emphasis added).

10. Notwithstanding the general right of public access to judicial records,[2] codified by section 107(a) of the Bankruptcy Code, the Court may authorize limited exceptions to a debtor's disclosure requirements, such as that imposed by Bankruptcy Rule 1007(a)(1), in order to protect information that legitimately requires confidential treatment because its disclosure would create an undue risk of identity theft or other unlawful injury to the individual or the individual's property. *See* 11 U.S.C. § 107(c).

[2] *See generally Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 591 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

11. In seeking to apply any such exception, however, the burden is on the moving party to show "that the interest in secrecy outweighs the presumption in favor of access." *See In re Continental Airlines*, 150 B.R. 334, 340 (D. Del. 1993).

12. Section 107(c) provides in relevant part:

> (1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:
>
> > (A) Any means of identification (*as defined in section 1028(d) of title 18*) contained in a paper filed, or to be filed, in a case under this title.
> >
> > (B) Other information contained in a paper described in subparagraph (A).

(emphasis added).

13. Section 1028(d)(7) of title 18 provides that the term 'means of identification' means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any—

> (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
>
> (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
>
> (C) unique electronic identification number, address, or routing code; or
>
> (D) telecommunication identifying information or access device (as defined in section 1029(e)).

14. Notably, mailing addresses are not one of the enumerated "means of identification" defined in section 1028(d) of title 18.

15. Moreover, the Debtor has not set forth any particularized facts demonstrating that disclosure of individual creditor mailing addresses in the Creditor Matrix would create any undue

risk of identity theft or other unlawful injury. The Debtor should be required to supplement the record so as to satisfy their burden under section 107(c) and allow the Court and parties in interest to determine whether redaction is appropriate under the circumstances.

16. Further, any relief granted should not be so overarching as to prevent the public, and especially parties in interest, from accessing information in what is an inherently public process. Any relief should be tailored accordingly. *See, e.g., In re PGHC Holdings, Inc., et al.,* Case No. 18-12537-MFW (Bankr. D. Del. Nov. 30, 2018) ("Within three (3) business days of entry of this Order, the Debtors shall file the Creditor Matrix with the home addresses of current and former employees to the extent maintained in the ordinary course in the Debtors' books and records, *provided, however*, that the Debtors are authorized to redact the addresses of current and former employees who are known to the Debtors to be under the age of 18 as of the date of this Order.").

WHEREFORE, the U.S. Trustee respectfully requests that the Court deny the Motion as written and grant any such other and further relief that it deems just and proper.

Respectfully Submitted,

ANDREW R. VARA,
ACTING UNITED STATES TRUSTEE
REGION 3

Dated: April 19, 2019

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FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
	Case No. 19-10844 (BLS)
Achaogen, Inc.,	
Debtor.	

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on April 19, 2019, the United States Trustee's Objection to Debtor's Motion to File Under Seal Portions of Its Creditor Matrix Containing Certain Individual Creditor Information was served in the manner indicated to the following persons:

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